Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

JACK C. SMITH,

Petitioner,

v.

ANTHONY M. FRANK, POSTMASTER GENERAL

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether notice of entry of judgment given to local counsel, but not to lead counsel, within 21 days of its entry, precludes the district court from reopening the time for appeal under Rule 4(a)(6) when lead counsel does not receive actual notice until after the time for appeal under Rule 4(a)(1) has expired.

2. Whether, when plaintiff's failure to file a timely notice of appeal occurred before the effective date of new Rule 4(a)(6) of the Federal Rules of Appellate Procedure but plaintiff submitted his motion to reopen the time for filing a notice of appeal under Rule 4(a)(6) after the effective date plaintiff's motion should be decided under the new Rule 4(a)(6).

3. Whether a district court may vacate and reenter a judgment under Rule 60(b)(1) of the Federal Rules of Civil Procedure to extend the time for filing a notice of appeal, when counsel did not timely file a notice of appeal because of excusable neglect, which arose during the period for filing a notice of appeal.

4. Whether an appellate court may deny a Rule 60(b)(1) motion to vacate and reenter judgment so as to extend the time for filing a notice of appeal on the grounds that the actions of plaintiff's lead counsel did not constitute excusable neglect because they had received constructive notice of entry of judgment and did not exhibit due diligence in inquiring whether entry of judgment had occurred.

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Jack Smith respectfully petitions this Court for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

None of the opinions in this case are reported. The January 27, 1994, memorandum opinion of the Court of Appeals for the Ninth Circuit, which is the subject of this petition, appears in the Appendix here ("Pet. App. A,") at 5a. The April 22, 1992, Order of the district court denying plaintiff's Motion to Reopen the Time for Filing a Notice of Appeal or, Alternatively, to Vacate and Reenter the Judgment appears in the Appendix at 12a.

JURISDICTION

The United States Court of Appeals for the Ninth Circuit issued its opinion affirming the district court's judgment against the petitioner on January 27, 1994. The Supreme Court has jurisdiction to review the judgment below under 28 U.S.C. 1254(1).

RULES OF PROCEDURE INVOLVED IN THE CASE

The following rules, which are set forth in the Appendix to this petition at 1a, are involved in this case: Rule 4(a) of the Federal Rules of Appellate Procedure, Rule 60(b) of the Federal Rules of Civil Procedure, and Rule 77(d) of the Federal Rules of Civil Procedure.

STATEMENT OF THE CASE

In January 1968, defendant hired plaintiff as a distribution clerk in the Concord, California, Post Office. Magistrate's Findings of Fact, Conclusions of Law, and Recommendations, June 21, 1985 (attached in the Appendix at 20a), Finding of Fact 1 (hereafter "FF"). During the course of his employment, plaintiff had five back operations. FF 4-9.

Following the fifth surgery in 1984, plaintiff returned to work on temporary light duty status. FF 12. The limitations imposed by Dr. Charles W. Barnes, plaintiff's treating physician, were: "[T]he patient can stand, sit 6-8 hours a day though with several breaks, more for changing position. He should avoid heavier lifting, keeping lifting to 10-15 pounds, and that not on a frequent basis. Repetitive bending as well as twisting should be avoided." FF 13. In September 1984, Dr. Willie L. Wilson, a Postal Service

Medical Officer, gave plaintiff medical clearance to return to work under essentially the same limitations as those set by Dr. Barnes. FF 14.

While on light duty status, plaintiff would sort bundles of local bulk mail, which weighed about one pound, from a tub at the end of a case. FF 22. Plaintiff also would sort first class mail which the supervisor or another distribution clerk would carry to plaintiff's case in a tray. FF 23. Plaintiff could not perform duties performed by some of the other distribution clerks as a result of his weight limitations and stooping and bending restrictions. FF 22, 23, 25. However, it would have been unlikely that a distribution clerk with plaintiff's seniority would have been asked to perform many of those duties, such as unloading trucks, distributing parcels, or breaking down mail. FF 25. Plaintiff's supervisors and the President of the American Postal Workers Union local in Concord considered plaintiff to be of average or above average proficiency in mail distribution. FF 27.

In February 1985, defendant ordered plaintiff to submit to a Fitness-for-Duty examination. FF 29. Dr. Wilson, who performed the examination, concluded that plaintiff was not fit to return to full duty status and therefore that the work limitations should remain unchanged. *Ibid.*

William A. Helm, the postmaster of the Concord Post Office, terminated plaintiff's light duty authorization in the spring of 1985. FF 31-32. On June 11, 1985, Supervisor Fred Blackburn wrote to plaintiff informing him that he

would be separated from the Postal Service. FF 36; Pl. Ex. 24.[1]

On June 21, 1985, plaintiff filed an administrative discrimination complaint. On June 27, 1985, Postmaster Helm sent plaintiff a letter of decision informing plaintiff that he was terminated as of July 1985. *Ibid.*

On July 29, 1986, plaintiff filed suit against defendant under the Rehabilitation Act. The district court had subject matter jurisdiction pursuant to 42 U.S.C. 2000e-5(f)(3), 42 U.S.C. 2000e-16(c) and (d), and 29 U.S.C. 794(a)(1), which give jurisdiction to the district courts over suits by federal employees involving complaints of handicap discrimination, and under 28 U.S.C. 1331, which gives jurisdiction to the district courts over cases involving federal questions. Since 180 days had passed from the time plaintiff filed his administrative complaint of discrimination with defendant, plaintiff had exhausted his administrative remedies with respect to the claims raised in the complaint to the extent required by 42 U.S.C. 2000e-16(c).

On September 20, 1985, the Magistrate issued proposed Findings of Fact, Conclusions of Law, and Recommendations, which were adverse to the plaintiff.[2] On

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[1] The Plaintiff's Exhibits referred to in the Statement of the Case were submitted by plaintiff to the district court.

[2] In response to the Magistrate's findings, plaintiff requested permission to exceed the page limit for his memorandum containing objections, accompanying this motion with his objections. The district court denied the motion. Plaintiff then requested permission to file a shortened version of the objections, accompanying the motion with the shortened objections. On November 29, 1989, the district court adopted, without opinion and without considering plaintiff's objections, the

July 18, 1991, the district court issued an Order adopting the Magistrate's Findings of Fact and Conclusions of Law and directing that judgment be entered against the plaintiff. The district court adopted the Magistrate's ruling that, notwithstanding the Postal Service's own Fitness-for-Duty examination concluding that plaintiff was fit for light duty work, the Post Office had substantial basis to find that plaintiff posed a reasonable probability of substantial harm to himself or others.

The district court's order was never sent to any of plaintiff's counsel. CR 199, Affidavit of Susan J. McGolrick (hereafter "McGolrick Aff."), paras. 3, 7; CR 198, Affidavit of Tracey Cole-Hailey (hereafter "Cole-Hailey Aff."), paras. 2-5.[3] The judgment was entered on July 19, 1991, but was sent only to the office of plaintiff's local counsel, James E. Eggleston. CR 199, McGolrick Aff., paras. 3, 7; CR 198, Cole-Hailey Aff., paras. 2-5; CR 201, Affidavit of James E. Eggleston (hereafter "Eggleston Aff."), para. 3. Neither Mr. Eggleston nor anyone in his office contacted plaintiff's primary counsel, Terris, Pravlik & Wagner, or plaintiff himself, to inform them about the entry of judgment. *Id.*, paras. 2-3; CR 199, McGolrick Aff., para. 7. Plaintiff's primary counsel did not become aware that the court had decided to adopt the Magistrate's

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Magistrate's recommended Findings of Fact, Conclusions of Law, and Recommendations, and entered a judgment dismissing plaintiff's action. On December 4, 1989, the district court denied, again without opinion, plaintiff's motion to file its shortened objections. On appeal, on January 9, 1991, the Court of Appeals for the Ninth Circuit reversed and remanded, directing the district court to allow plaintiff to file objections which conformed to the page limitation.

[3] Affidavits given "CR" numbers were submitted to the court of appeals in plaintiff's October 2, 1992, "Excerpts of Record."

findings and conclusions until January 2, 1992, when defendant's counsel contacted plaintiff's counsel regarding a related matter and happened to refer to the decision. *Id.*, para. 4.

Mr. Eggleston's office did not forward the judgment to plaintiff's primary counsel because all previous communications from the court had been sent to primary counsel as well as to local counsel.[4] CR 197, Affidavit of

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[4] The following documents were sent by the district court to plaintiff's primary counsel:

Document Number	Description of Document
1.	2/3/87, Order, re: status conference
2.	2/27/87, Order, re: transfer of case
3.	3/2/87, Notice of Continuance
4.	6/8/87, Order, re: pre-trial preparation
5.	11/2/87, Order, re: Local Rule 228
6.	12/16/87, Order, re: defendant's motion to transfer intradistrict venue to San Francisco
7.	12/30/87, Reassignment Order
8.	3/10/88, Scheduling Order, re: pre-trial proceedings and trial date
9.	4/8/88, Notice of Settlement Conference
10.	10/14/88, Notice of Further Settlement Conference
11.	12/8/88, Order, re: plaintiff's motion for partial summary judgment
12.	3/14/89, Order of Reference
13.	5/3/89, Notice of Status Conference
14.	5/24/89, Order, re: starting date of trial, availability of Dr. Wilson, dates for filing lists of exhibits and witnesses
15.	6/29/89, Order, re: production of documents
16.	7/24/89, Order, re: discovery
17.	7/26/89, Order, re: telephone conference
18.	8/22/89, Order, re: plaintiff's motion for leave to file memorandum in excess of page limitation

Laraine L. Laudati (hereafter "Laudati Aff."), paras. 5-6; CR 199, McGolrick Aff., para. 8; CR 201, Eggleston Aff., para. 4. The court was aware that Mr. Eggleston had no substantive involvement in representing plaintiff in this case since he had never appeared in court. CR 197, Laudati Aff., para. 5; CR 201, Eggleston Aff., para. 2.

Upon learning of the July 19, 1991, entry of judgment, plaintiff's primary counsel immediately filed, on January 7, 1992, a motion to reopen the time for filing a notice of appeal or to vacate and reenter the judgment. CR 199,

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19. 9/19/89, Recommendations Re Defendant's Motion for Additional Sanctions Including Dismissal
20. 9/20/89, Magistrate's Findings of Fact, Conclusions of Law and Recommendations
21. 10/30/89, Stipulation and Order Enlarging Time within which Plaintiff Must File Objections to Magistrate's Recommendations
22. 10/30/89, Order, Plaintiff's Objections to the Magistrate's Recommendations re Defendant's Motion for Additional Sanctions Including Dismissal, re: plaintiff's motion to exceed page limitation
23. 10/30/89, Order, Plaintiff's Objections to the Magistrate's Findings of Fact, Conclusions of Law, and Recommendations, re: plaintiff's motion to exceed page limitation
24. 11/29/89, Order, re: adoption of Magistrate's recommendations
25. 11/29/89, Judgment
26. 12/4/89, Order, re: plaintiff's motion for leave to file objections to Magistrate's recommendations
27. 12/4/89, Order, re: plaintiff's motion for leave to file objections to Magistrate's findings and conclusions
28. 1/31/90, Order Awarding Sanctions
29. 6/4/91, Stipulation and Order Extending Briefing Schedule for Plaintiff's Objections to Magistrate's Recommendations

McGolrick Aff., para. 11. The district court denied plaintiff's motion on April 22, 1992.

The district court declined to use Rule 4(a)(6) of the Federal Rules of Appellate Procedure to grant plaintiff's motion on two grounds. First, the court doubted the rule could be applied retroactively, since the rule did not become effective until December 1, 1991, at which point plaintiff's time for appeal under Rule 4(a)(1) had already expired. Pet. App. A, p. 15a. Assuming Rule 4(a)(6) did apply, the court found that the notice to plaintiff's local counsel prevented plaintiff from taking advantage of its provisions. *Id.* at 16a. The district court denied plaintiff relief under Rule 60(b) of the Federal Rules of Civil Procedure on the ground that the notice given to plaintiff's local counsel prevented plaintiff from satisfying the test for a Rule 60(b)(1) extension of time to file a notice of appeal enunciated in *Rodgers v. Watt*, 722 F.2d 456, 460 (9th Cir. 1983)(en banc), which requires that movant not have received notice of entry of judgment. In addition, the district court found that plaintiff's counsel had not demonstrated the due diligence required by *Rodgers v. Watt*. Pet. App. A, p. 18a. Finally, the district court rejected relief under Rule 60(b)(6), because plaintiff did not demonstrate "extraordinary circumstances." *Id.* at 18a.

Plaintiff timely filed a Notice of Appeal on June 16, 1992. The United States Court of Appeals for the Ninth Circuit had jurisdiction pursuant to 42 U.S.C. 2000e-5(j).

The court of appeals affirmed the district court. It did not reach the issue of whether Rule 4(a)(6) applied in this case, but simply affirmed the district court's finding that plaintiff could not take advantage of that rule, if it did apply, since local counsel had received notice. Pet. App. A, p. 8a. The court of appeals also affirmed the district court's ruling

that relief under Rule 60(b) could not be granted. The court of appeals rested its holding primarily on the ground that *Rodgers v. Watt* makes Rule 60(b)(1) relief unavailable in situations where the excusable neglect which gives rise to the Rule 60(b) motion arose during the 60-day period for filing a notice of appeal under Rule 4(a) and plaintiff's local counsel received notice of entry of judgment during that period. *Id.*, p. 9a. In the alternative, the court of appeals held that plaintiff's late filing was not caused by "excusable neglect," as defined by *Rodgers v. Watt*, because plaintiff's local counsel had received notice of entry of judgment and plaintiff's lead counsel had failed to demonstrate due diligence because she did not ask the district court clerk whether judgment had been entered over a six-month period. *Id.*, p. 10a, n. 3. Finally, the court of appeals affirmed the district court's ruling refusing Rule 60(b)(6) relief. *Id.*, p. 10a.

REASONS FOR GRANTING THE WRIT

INTRODUCTION

This case comes to the Court as another chapter in the long history of attempts by the judicial system to reconcile the importance of deciding cases on the merits with the value of reliance on the finality of decisions. Despite recent rules changes which were intended to alter the harsh results of the past by placing more emphasis on deciding cases on the merits, the court of appeals persisted in applying its old analysis which imposed a strict duty of due diligence on plaintiff to monitor the district court's docket so as to ascertain that judgment has been entered before the time for appeal has expired. In indicating that plaintiff's counsel had not committed "excusable neglect" under Rule 60(b)(1) of the Federal Rules of Civil Procedure, the court of appeals

stated that "the lack of due diligence by lead counsel who failed to inquire for six months, would count against Smith."[5] Pet. App. A, p. 10a, n. 3. This duty to inquire repeatedly of the clerk about entry of judgment is inconsistent with the changes wrought by the 1991 amendments to the Federal Rules.

Prior to the 1991 amendments, more than one court had lamented the unfair strictures it believed that the rules imposed when counsel had not received notice. For example, in 1975, Judge Wisdom, writing for the court in *Fidelity and Deposit Company of Maryland v. USAFORM Hail Pool, Inc.*, 523 F.2d 744, 749 (5th Cir. 1975) *certiorari denied*, 425 U.S. 950 (1976), observed that:

> The potential hardship to parties whose counsel, through inadvertence or lack of diligence, failed to learn of the entry of judgments is apparent. Less apparent is whether the benefit of enhanced finality outweighs these cases of hardship, and the burden on all concerned with respect to the periodic inquiries the amended rule implicitly contemplates.

In 1985, in *Hall v. Community Mental Health Center of Beaver County*, 772 F.2d 42 (3rd Cir. 1985), Judge Higginbotham wrote separately to emphasize the unfairness of the rules as they then appeared. In his opinion, "the current law on this issue seems totally inconsistent with basic concepts of justice and fairness." *Id.* at 46. He repeated what all litigators know (*ibid.*):

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[5] In fact, lead counsel's Rule 4(a)(6) motion was lodged within the 180-day time limit.

> [T]he doctrine that lack of notice of a final judgment cannot affect the running of the time for appeal makes practically no sense in light of the way the real world actually functions. We have created a ludicrous situation where the only way a litigant can protect himself would be to check all of the dockets of the court and make inquiries daily, and even then must rely, at his or her own peril, on information that may itself be erroneous.

In *Polyok Corp. v. Manning*, 793 F.2d 1318, 1321 (D.C. Cir. 1986), Judge Mikva recognized that the combination of Rule 4 of the Federal Rules of Appellate Procedure and Rule 77(d) of the Federal Rules of Civil Procedure:

> may produce harsh results in cases where the losing party, through no fault of its own, simply does not receive notice of the judgment until the time for filing an appeal has expired. We also acknowledge that the problems occasioned by non-receipt of notice cannot be eliminated simply by charging litigants to follow the progress of pending cases more carefully. If the party does not receive proper notice, it is no easy matter to find out that the case under submission has been decided. Reading the local legal newspaper, for example, is insufficient in jurisdictions where the newspaper does not provide a complete, daily listing of all dispositive orders or judgments entered in district court cases. Nor can this court cavalierly require the parties to make inquiries with the clerk's office every twenty-nine days, so that the losing party may file a timely notice of appeal from even those dispositive orders that were entered immediately after the party's

> previous inquiry. Such an order would impose an onerous task upon litigants to make periodic inquiries of the clerk's office in every court in which they have a case under submission, and would unduly burden the clerk's offices.

In 1991, pursuant to this Court's order, Rule 4(a) of the Federal Rules of Appellate Procedure and Rule 77(d) of the Federal Rules of Civil Procedure were amended to address the problem of failure to receive notice of entry of judgment. The newly added Rule 4(a)(6) provides that:

> The district court, if it finds (a) that a party entitled to notice of the entry of a judgment or order did not receive such notice from the clerk or any party within 21 days of its entry and (b) that no party would be prejudiced, may upon motion filed within 180 days of entry of the judgment or order or within 7 days of receipt of such notice, whichever is earlier, reopen the time for appeal for a period of 14 days from the date of entry of the order reopening the time for appeal.

The Notes of the Advisory Committee explain that this new clause provides a limited opportunity for a party who does not receive notice of entry of judgment pursuant to Rule of Civil Procedure 77(d) to file a timely appeal. At the same time, Rule 77(d) was amended to be consistent with the amended Rule 4. The Notes of the Advisory Committee accompanying that amendment explain that:

> This revision is a companion to the concurrent amendment to Rule 4 of the Federal Rules of Appellate Procedure. The purpose of the revisions is to permit district courts to ease strict sanctions

now imposed on appellants whose notices of appeal are filed late because of their failure to receive notice of entry of a judgment.

* * *

Failure to receive notice may have increased in frequency with the growth in caseload in the clerk's offices. The present strict rule imposes a duty on counsel to maintain contact with the court while a case is under submission. Such contact is more difficult to maintain if counsel is outside the district, as is increasingly common, and can be a burden to the court, as well as counsel.

* * *

The effect of the revisions is to place a burden on prevailing parties who desire certainty that the time for appeal is running. Such parties can take the initiative to assure that their adversaries receive effective notice.

Thus, the 1991 Amendments to the Federal Rules impose on prevailing parties, not losing parties, the duty to assure that notice is received. More broadly, the Amendments emphasize more than previously the importance of deciding cases on their merits. In contrast, the court of appeals in this case exalted finality in a series of rulings which violate the Rules, are in conflict with decisions of other circuits, and which were plainly inequitable.

I. THE DECISION BELOW IS IN CONFLICT WITH DECISIONS IN OTHER CIRCUITS AS TO WHETHER NOTICE TO LOCAL COUNSEL IS IMPUTABLE TO LEAD COUNSEL WHEN LOCAL COUNSEL FAILS TO COMMUNICATE THE NOTICE

Rule 4(a)(6) of the Federal Rules of Appellate Procedure provides that if "a party entitled to notice of the entry of judgment or order did not receive such notice from the clerk or any party within 21 days of its entry" and a motion is filed within 180 days of the entry of judgment, the court may reopen the time for appeal for 14 days. That provision went into effect on December 1, 1991, after plaintiff's time for appeal had expired but before plaintiff's primary counsel received the appealable judgment. The court of appeals declined to decide whether Rule 4(a)(6) applied, concluding that plaintiff could not obtain relief even if it did. It held that, since plaintiff's local counsel had received notice, plaintiff had received constructive notice sufficient to disqualify him from the benefits of Rule 4(a)(6). Pet. App. A, p. 9a. This holding conflicts with the law of other circuits.

In this case, the district court's order was not sent to any of plaintiff's counsel. The judgment was sent to plaintiff's local counsel who had not been actively involved in the case. Because of the court's practice of mailing all its orders to plaintiff's lead counsel, local counsel did not even perform the routine function of notifying lead counsel when court orders were entered.

The court of appeals held that "[w]here a party has two counsel of record, notice to one counsel sufficiently informs a party of an entry of judgment," even when the only

counsel that is actively involved in managing the case does not receive notice. Pet. App. A, p. 8a. The court relied on *Alaska Limestone Corp. v. Hodel*, 799 F.2d 1409, 1412 (9th Cir. 1986). *Alaska Limestone* stated that a party must show "unique circumstances" to obtain an extension of time to appeal, even under the "excusable neglect" standard in Rule 4(a)(5) and that a miscommunication between counsel is not a "unique circumstance." *Id.* at 1411-1412. It stated further that "[i]nadvertence or mistake of counsel * * * does not constitute excusable neglect." *Id.* at 1411. This conclusion formed the basis of *Alaska Limestone's* holding that notice to local counsel is always sufficient notice.[6]

Plaintiff has been unable to discover any case which decides the same issue under Rule 4(a)(6) as to whether the time for appeal may be extended where only local counsel have been notified of the entry of judgment. However, courts have addressed this issue in deciding motions to extend the time for appeal under Rule 4(a)(5) and under Rule 60(b) of the Federal Rules of Civil Procedure. Although those rules do not have the same notice requirement as Rule 4(a)(6), the decisions are directly on point because they rule on the issue of whether the time for appeal may be extended under the "excusable neglect" standard when only local counsel received notice. The *Alaska Limestone* case, on which the court of appeals relied, is a case decided under the "excusable neglect" standard.

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[6] Thus, in refusing to apply Rule 4(a)(6), the court of appeals relied on a holding about sufficiency of notice which in turn relied on an interpretation of "excusable neglect" which is contrary to this Court's interpretation of that term in *Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership*, 113 S. Ct. 1489 (1993). See pp. 23-27 below.

Some circuits have agreed with the Ninth Circuit and imposed a strict standard in cases where notice of appeal was filed late because of a failure by local counsel to notify lead counsel of judgment. See *Lord v. Helmandollar*, 348 F.2d 780, 782 (D.C. Cir. 1965), certiorari denied, 383 U.S. 928 (1966)(where local counsel received notice of a judgment but lead counsel did not, time for filing notice of appeal was not extended); *Pasquale v. Finch*, 418 F.2d 627, 630 (1st Cir. 1969)(where United States Attorney, government's counsel of record, received notice of judgment and mailed the notice to the Justice Department, which misplaced the notice for two months, time for filing notice of appeal was not extended); *Borowski v. DePuy, Inc.*, 876 F.2d 1339, 1341 (7th Cir. 1989)(where local counsel failed to forward magistrate's report to chief counsel, no "excusable neglect" under Rule 60(b)(1)); *Gooch v. Skelly Oil Co.*, 493 F.2d 366, 370 (10th Cir. 1974)(where one counsel of record received notice of judgment but chief counsel did not, situation did not rise to "unique and extraordinary circumstances" standard required for a finding of excusable neglect to extend time for appeal under Rule 4).

On the other hand, other circuits have concluded that miscommunication between local counsel or other counsel of record and lead counsel is sufficient grounds to grant a motion to extend the time for notice of appeal. See, *e.g.*, *Babich v. Clower,* 528 F.2d 293 (4th Cir. 1975)(where appellant's local counsel, but not appellant's lead counsel, received notice of judgment, court held that lead counsel's failure to learn of judgment was excusable neglect under Rule 4(a)(5)); *Mennen Co. v. Gillette Co.*, 719 F.2d 568, 570 (2d Cir. 1983)(*Babich v. Clower* cited as a good example of when failure to receive notice of judgment warrants an extension of the time to appeal). See also *Resnick v. Lehigh Valley R. Co.*, 11 F.R.D. 76, 77

(S.D.N.Y. 1951)(time to file notice of appeal under Rule 73(a) of the Federal Rules of Civil Procedure, now Rule 4(a) of the Federal Rules of Appellate Procedure, extended when plaintiff's trial counsel, who was in active charge of the case, failed to receive timely notice of judgment, although plaintiff's attorney of record did receive timely notice).

In sum, a conflict exists among the circuits as to whether, when local counsel receives notice of entry of judgment but fails to communicate the notice to lead counsel, notice of entry of judgment is imputable to lead counsel for purposes of extending the time for notice of appeal.

II. THERE IS A CONFLICT AMONG THE CIRCUITS WHETHER NEWLY ENACTED RULE 4(a)(6) OF THE FEDERAL RULES OF APPELLATE PROCEDURE APPLIES TO CASES IN WHICH THE TIME FOR FILING NOTICE OF APPEAL UNDER RULE 4(a)(1) EXPIRED BEFORE RULE 4(a)(6) BECAME EFFECTIVE

The court of appeals declined to decide whether the newly adopted Rule 4(a)(6) of the Federal Rules of Appellate Procedure applied because, as we have seen above, it found that the Rule would not provide relief in any event. Pet. App. A, p. 8a. In order to reach the question presented in Section I of this petition, whether notice given to local counsel but not lead counsel within 21 days of entry of judgment precludes the district court from granting relief under the Rule, this Court must first decide whether the Rule applies. Accordingly, the conflict among circuits on that issue is discussed below.

In its order promulgating the 1991 amendments to the Federal Rules of Appellate Procedure, this Court directed

(Amendments to Federal Rules of Appellate Procedure, interim volume 111 S. Ct. 1011 (1991)):

> That the foregoing amendments to the Federal Rules of Appellate Procedure shall take effect on December 1, 1991, and shall govern all proceedings in appellate cases thereafter commenced and, insofar as just and practicable, all proceedings in appellate cases then pending.

The district court entered judgment in this case on July 18, 1991. Lead counsel did not receive notice of entry of judgment until January 2, 1992, after the effective date of the amended rules. Plaintiff promptly moved on January 7, 1992, to reopen the time for filing notice of appeal, under Rule 4(a)(6) of the Federal Rules of Appellate Procedure and Rule 60(b)(1) and (6) of the Federal Rules of Civil Procedure. Hence, this case was pending in the district court before the amended rules became effective, but the motion to reopen the time for appeal was made after Rule 4(a)(6) became effective. Plaintiff's motion to reopen was made within the 180-day period provided for in Rule 4(a)(6). Nevertheless, the district court refused to apply the new rules (Pet. App. A, p. 15a) and the court of appeals declined to reverse (Pet. App. A, p. 9a).[7]

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[7] This failure to apply the new rules was inconsistent with this Court's directive to apply the new rules, insofar as just and practicable, in pending appellate cases. Amendments to Federal Rules of Appellate Procedure, *supra*, interim volume 111 S. Ct. at 1011. In view of the holding of this Court in *Pioneer* to apply liberally the concept of "excusable neglect" (113 S. Ct. at 1497) and the policy behind the 1991 amendment to Rule 4 to allow a party that did not receive notice from the court clerk a 180-day grace period in which to move to reopen the time for appeal, it would be unjust to refuse to apply Rule 4(a)(6) in this case. See pp. 9-14, above.

One other court has considered in a published opinion the question whether to apply the 1991 amendments to a motion to extend time to file a notice of appeal, when the case was pending before the amendments came into effect. In *In re Jones*, 970 F.2d 36 (5th Cir. 1992), the appellants filed a Rule 60(b)(6) motion to extend the time for notice of appeal, and the appellees responded, before the new Rule 4(a)(6) became effective. Thus, as in the instant case, the time for filing a notice of appeal under Rule 4(a)(1) had passed before the new rule became effective. Unlike the present case, the motion to extend the time for filing a notice was also filed before the new rule became effective. *Id.* at 38. Nonetheless, citing "the general rule that courts apply procedural rules as they exist at the time of the decision, as long as no manifest injustice results," the Fifth Circuit applied the new version of Rule 4(a). *Ibid.*

On the other hand, in unpublished opinions, the Tenth Circuit came to the same result as the district court in this case. *See Gamble v. United States*, 989 F.2d 507 (Table), 1993 WL 55958 (10th Cir. 1993); *Payton v. Spruiell*, 951 F.2d 1260, 1992 WL 2886 (10th Cir. 1992). On November 29, 1993, the Tenth Circuit suspended its Local Rule 36.3 which provided that unpublished opinions had no precedential value. The unpublished opinions are prefaced with the notice that "citation of unpublished opinions remains unfavored."

Thus, a conflict exists between the Fifth and Tenth Circuits on this issue. Petitioner submits that *In re Jones* was correctly decided and Rule 4(a)(6) of the Federal Rules of Appellate Procedure applies to this case.

III. THE DECISION BELOW IS IN CONFLICT WITH NUMEROUS DECISIONS OF OTHER CIRCUITS AS TO THE APPLICABILITY OF RULE 60(b)(1) IN CASES WHERE IT IS INVOKED TO EXTEND THE TIME FOR APPEAL

The court of appeals held that, under *Rodgers v. Watt*, *supra*, relief under Rule 60(b)(1) of the Federal Rules of Civil Procedure is unavailable where the excusable neglect which gives rise to a Rule 60(b)(1) motion arose during the period for filing a notice of appeal under Rule 4(a)(1)(or the period for requesting an extension under Rule 4(a)(5)). Pet. App. A, p. 9a. The court of appeals applied this requirement to mean that if counsel, save for excusable neglect, should have been aware of entry of judgment during that the 60-day period, Rule 60(b) is not available. *Ibid.*

The Ninth Circuit's approach conflicts with that adopted by most of the circuits in order to address the seemingly competing requirements of Rule 4 and Rule 60. Most circuits have concluded that out of respect for the time limits imposed by Rule 4(a) for the filing of notices of appeal, a more stringent test must govern petitions for relief to extend the time for appeal under Rule 60(b) than for other types of Rule 60(b) motions, such as motions to vacate a default judgment. The more stringent test required the movant to demonstrate some evidence of due diligence, rather than mere excusable negligence.[8] However, none of these

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[8] This due diligence requirement itself represents an evolution in the continuing attempt by courts to reconcile the requirements of Rule 4 of the Federal Rules of Appellate Procedure and Rule 60 of the Federal Rules of Civil Procedure. In 1946, Rule 77(d) of the Federal Rules of Civil Procedure was amended, in the wake of this Court's opinion in *Hill v. Hawes*, 320 U.S. 520 (1944)(upholding the district courts' discretion

circuits went beyond use of a due diligence requirement to impose a requirement concerning when the excusable neglect

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to extend the time for appeal if the court clerk failed to serve notice of entry of judgment) to provide that lack of notice of entry of judgment did not affect the time to appeal, except as permitted in Rule 73(a). See *Rodgers v. Watt, supra*, 722 F.2d at 458; *Lord v. Helmandollar, supra*, 348 F.2d at 782. At the same time, Rule 73(a)(now Rule 4(a) of the Federal Rules of Appellate Procedure) was amended to give litigants an escape hatch -- the time for filing a notice of appeal could be extended upon a showing of excusable neglect if a motion was filed within 30 days after expiration of the time for appeal under Rule 4(a)(1). *Rodgers v. Watt, supra*, 722 F.2d at 458. Rule 4(a)(5) appeared to overlap with Rule 60(b)(1) by allowing a 30-day extension in cases of excusable neglect. Mindful of the adverse reaction to *Hill v. Hawes*, courts initially simply refused to grant Rule 60(b) motions for the extension of time to appeal. See *West v. Keve*, 721 F.2d 91, 96-97 (3rd Cir. 1983); *Hodgson v. United Mine Workers of America*, 473 F.2d 118, 124, n. 31 (D.C. Cir. 1972). Gradually, however, courts evolved a standard which was meant to respect the application of Rule 4, yet at the same time allow the use of Rule 60 to correct the unfairness inherent in punishing a litigant for failure to file a timely appeal when he does not receive notice of entry of judgment.

arises.[9] Only the Ninth Circuit (and perhaps the Tenth

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[9] See, *e.g.*, *Expeditions Unlimited Aquatic Enterprises, Inc. v. Smithsonian Institute*, 500 F.2d 808, 810 (D.C. Cir. 1974)(per curiam)(if neither party received actual notice, prevailing party not prejudiced, and losing party moves within reasonable time of learning of entry of judgment, Rule 60(b) relief may be granted); *Scola v. Boat Frances, R., Inc.*, 618 F.2d 147, 152 (1st Cir. 1980)(Rule 60(b) relief may be granted based on balancing the factors of prejudice, explanation of delay in appealing, and the substantiality of the rights involved); *Mennen Co. v. Gillette Co., supra*, 719 F.2d at 570, n. 5 (party must make more than a showing of excusable neglect for Rule 60(b) relief); *Burkett v. Cunningham*, 826 F.2d 1208, 1217 (3rd Cir. 1987)(in exceptional circumstances, Rule 60(b) relief may be granted outside the time constraints of Rule 4(a)(5)); *Hall v. Community Mental Health Center of Beaver County, supra*, 772 F.2d at 45 (3rd Cir.)(Rule 60(b) relief may be granted when delay is due to reliance on some affirmative behavior of the district court); *Fidelity and Deposit Co. of Maryland v. USAFORM Hail Pool, Inc., supra*, 523 F.2d at 751 (5th Cir.), (where parties rely on court's instructions not to inquire about entry of judgment and do not receive notice of judgment, Rule 60(b) relief will be granted); *Smith v. Jackson Tool & Die, Inc.*, 426 F.2d 5, 8 (5th Cir. 1970)(per curiam)(in unusual circumstances, court may refer to equitable considerations under Rule 60(b) to vacate a judgment to extend time for appeal); *Spika v. Village of Lombard, Illinois*, 763 F.2d 282, 285 (7th Cir. 1985), certiorari denied, 474 U.S. 1056 (1986)(Rule 60(b) relief may be granted to extend time for appeal on a showing of due diligence); *Buckeye Cellulose Corp. v. Braggs Electric Construction Co.*, 569 F.2d 1036, 1038 (8th Cir. 1978)(per curiam)(where clerk does not notify parties of entry of judgment despite telling parties it would do so and counsel diligently inquires about entry, Rule 60(b) relief may be granted); *Harnish v. Manatee County, Florida*, 783 F.2d 1535, 1537-1538 (11th Cir. 1986)(where clerk repeatedly told parties no judgment had been entered when it had been, Rule 60(b) relief granted).

As we show below (pp. 23-27), the due diligence requirement these cases impose is inconsistent with this Court's opinion in *Pioneer Investment Service Co. v. Brunswick Associates Ltd. Partnership.*

Circuit) imposes such a requirement.[10]

Therefore, the Ninth Circuit's requirement that Rule 60(b) cannot be applied where the excusable neglect arises during the period for applying a Rule 4(a)(5) motion conflicts with the determinations of numerous other circuits, which have resolved the conflict between the two rules by imposing a due diligence requirement without adding the Ninth Circuit's requirement concerning when the excusable neglect arises.

IV. THE DECISION BELOW CONFLICTS WITH THE DETERMINATION OF THIS COURT IN *PIONEER* AS TO THE MEANING OF "EXCUSABLE NEGLECT"

Rule 60(b)(1) of the Federal Rules of Civil Procedure provides, in pertinent part, that the court may relieve a party from a final judgment, within one year from entry, for "mistake, inadvertence, surprise, or excusable neglect." The court of appeals indicated that even if Rule 60(b)(1) applied, plaintiff's counsel had not committed "excusable neglect" under Rule 60(b)(1), as defined by *Rodgers v. Watt, supra*, since plaintiff's local counsel had received notice of entry of judgment and plaintiff's lead counsel had failed to demonstrate "due diligence," because she did not ask the

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[10] In *Wallace v. McManus*, 776 F.2d 915, 917 (10th Cir. 1985) (per curiam), the court stated its agreement with *Rodgers v. Watt* that relief should not be precluded when notice of the entry of judgment is not received until after the period for filing a Rule 4(a)(5) motion has expired. It is not clear from the opinion whether the court was also endorsing the corollary of *Rodgers v. Watt*, which was endorsed by the Ninth Circuit in this case, that where the excusable neglect does arise within the period for filing a Rule 4(a)(5) motion, Rule 60(b) relief is not available.

district court clerk whether judgment had been entered over a six-month period. Pet. App. A, p. 10a, n. 3. This position, which required plaintiff to show "due diligence" in order to establish "excusable neglect," directly conflicts with this Court's decision in *Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership, supra,* that excusable neglect includes attorney carelessness, inadvertence, and negligence.

In *Pioneer*, this Court examined the meaning of the term "excusable neglect" as used in Rule 9006(b)(1) of the Federal Rules of Bankruptcy Procedure. Examining the ordinary meaning of neglect as used in the bankruptcy rule, the Court explained that (113 S. Ct. at 1495):

> Congress plainly contemplated that the courts would be permitted, where appropriate, to accept late filings caused by inadvertence, mistake, or carelessness, as well as by intervening circumstances beyond the party's control.

As part of its analysis, the Court examined other rules, including Rule 60(b) of the Federal Rules of Civil Procedure, which contain the phrase "excusable neglect." 113 S. Ct. at 1497-1498. The Court concluded that "excusable neglect," as used in Rule 60(b)(1), encompasses inadvertence, mistake, or carelessness. *Id.* at 1497. The Court pointed out that Rule 60(b)(1) clearly covers cases of attorney carelessness, since Rule 60(b)(6), which is mutually exclusive of Rule 60(b)(1), explicitly covers the case where the attorney is faultless, allowing a party to move to reopen judgment even after one year has passed. *Ibid.* The Court explained that (*ibid.*):

> Thus, at least for purposes of Rule 60(b), "excusable neglect" is understood to encompass situations in which the failure to comply with a filing deadline is attributable to negligence. Because of the language and structure of Rule 60(b), a party's failure to file on time for reasons beyond his or her control is not considered to constitute "neglect."

The Court stated that, in order to determine whether neglect in any particular case is excusable, a court should balance "all relevant circumstances surrounding the party's omission," including (*id.* at 1498):

> [T]he danger of prejudice to the [non-movant], the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith.

The court of appeals in this case declined to apply the *Pioneer* balancing test. Instead it applied the Ninth Circuit's traditional test, enunciated in *Rodgers v. Watt, supra.* Pet. App. 10a, n. 3. *Rodgers v. Watt* requires that the court consider (722 F.2d at 460):

> (1) absence of Rule 77(d) notice; (2) lack of prejudice to respondent; (3) prompt filing of a motion after actual notice; and (4) due diligence, or reason for lack thereof, by counsel in attempting to be informed of the date of the decision.

Under this test, the court of appeals held that plaintiff's attorneys' neglect was not excusable, because of "the fact of

actual notice, and the lack of due diligence by lead counsel." Pet. App. 10a, n. 3.

The court of appeals' reasoning makes clear that, under *Rodgers v. Watt*, it was requiring that plaintiff demonstrate substantially more than "excusable neglect." If plaintiff had failed to receive actual notice and plaintiff had exercised "due diligence," plaintiff would have been completely blameless. "Due diligence" is an antonym of "negligence." Hence the court of appeals required that plaintiff not be negligent, in direct contradiction to this Court's determination in *Pioneer* that "excusable neglect" includes negligence. 113 S. Ct. at 1497.

The Ninth Circuit's application of its test to the facts in this case demonstrates the stringency of its "due diligence" requirement. The district court clerk established a consistent pattern of delivering all orders to plaintiff's lead counsel in Washington, D.C. The only order that was not so delivered was the judgment, which was only sent to local counsel in California. Local counsel had not participated in the proceedings and knew that all orders had been sent to lead counsel. As a result of reliance on the pattern of behavior established by the court, lead counsel did not receive actual notice of entry of judgment.

In *Pioneer*, this Court found excusable neglect even though lead counsel admitted receiving actual notice of the bar date for pressing a claim in a bankruptcy proceeding, because the notice was ambiguous. 113 S.Ct. at 1492. The neglect in *Pioneer* consisted of negligence in failing to appreciate or attempting to resolve the ambiguity. However, as the dissent in *Pioneer* noted (*id.* at 1504), there was no evidence that counsel was actually confused by the ambiguity. In contrast, here there is undisputed evidence

that plaintiff's counsel were misled by the court's prior practice of always serving orders on primary counsel. See pp. 5-7, above. Thus, if there is any difference between the two cases, the actions of plaintiff's counsel here were less negligent than the actions of counsel in *Pioneer*.

The holding below consequently is in direct conflict with this Court's determination in *Pioneer* as to "excusable neglect" under Rule 60(b)(1).

V. THE ISSUES RAISED IN THIS CASE ARE OF SUBSTANTIAL IMPORTANCE

The issues in this case arise with considerable frequency in federal litigation and therefore of substantial importance. As the Advisory Committee for the 1991 amendments to the Federal Rules of Civil Procedure observed, failure of courts to mail and the failure of counsel to receive notice of entry of judgment has likely increased in frequency with the growth of caseload in clerk's offices. Notes of the Advisory Committee accompanying Rule 77. As the Advisory Committee also noted, a strict rule requiring counsel to maintain continuous contact with the court while a case is under submission places a burden on counsel and the court. *Ibid.* The burden is even heavier where counsel is outside the district. As we have seen above, the courts have noted that this burden is unrealistic and unfair.

Moreover, the problem of communication between primary and local counsel continues to arise with considerable frequency. Under the decision of the court of appeals, this problem cannot be addressed under Rule 4(a)(6) of the Federal Rules of Appellate Procedure because local counsel received notice within the 21-day period after entry of judgment or under rule 60(b)(1) of the Federal Rules of

Civil Procedure because the excusable neglect arose during the 60-day period for filing a notice of appeal. Thus, according to the court of appeals, losing parties are denied any opportunity to seek relief for "excusable neglect" relating to miscommunication between primary and local counsel.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit should be granted.

Respectfully submitted,

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